

**Before the  
Federal Communications Commission  
Washington, DC**

|  |   |                          |
|--|---|--------------------------|
| In the Matter of                                 | ) |                          |
|  | ) |                          |
| Application for Review of the Streamlined        | ) |                          |
| Resolution of the Wireline Competition Bureau by | ) |                          |
|  | ) |                          |
| Atlanta Public Schools                           | ) | File Nos. SLD-762323 and |
| Atlanta, Georgia                                 | ) | SLD-81950                |
|  | ) |                          |
| Schools and Libraries Universal Service          | ) | CC Docket No. 02-6       |
| Support Mechanism                                | ) |                          |

**APPLICATION FOR REVIEW**

Pursuant to Section 1.115 of the Commission’s rules, Atlanta Public School (“School District”), by its representative, respectfully requests that the Commission review and reverse the Wireline Competition Bureau’s “streamlined resolution” of the School District’s appeal in the above-captioned matter and order the Universal Administrative Company (“USAC”) to fund all of the FY 2010 and 2011 funding requests in issue. In the alternative, the School District respectfully requests that the Commission reach the same result by waiving its rules.

The Wireline Competition Bureau (“WCB”) resolved this matter in its *Streamlined Resolution of Requests Related to Actions By the Universal Service Administrative Company* (DA 16-1448), released December 29, 2016.<sup>1</sup> In its two appeals,<sup>2</sup> the School District raised an extremely important policy issue that the WCB failed to address – namely, whether the Commission, in its efforts to promote competition for E-rate eligible services, has gone well beyond what is necessary,

---

<sup>1</sup> [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db1230/DA-16-1448A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1230/DA-16-1448A1.pdf)

<sup>2</sup> <https://www.fcc.gov/ecfs/filing/6017021382/document/7021896825> (No. 762323 filed March 2, 2012) and <https://www.fcc.gov/ecfs/filing/6017028647/document/7021907245> (No. 819508 filed April 6, 2012).

reasonable, and appropriate.

In addition to this policy issue, the case raises a number of other important policy questions that only the full Commission can address and answer:

- Is it the Commission’s intent to become, in effect, a state and local contract review board?
- Is the Commission doing more harm than good by permitting and perhaps even encouraging USAC to interpret language in applicants’ RFPs (“cardinal changes” for example) and to second-guess the procurement decisions of the tens of thousands of school and library applicants in the United States and its territories?

This case is especially important because it affords the Commission the opportunity to clarify the legitimate and appropriate scope of its authority to regulate state and local agency, public and private school, and library procurements for E-rate eligible goods and services. Consistent with President Trump’s and the new Congress’ mission to eliminate unnecessary, unreasonable, inappropriate, and overly burdensome federal regulations, we urge the Commission to do exactly that -- and to do so here.

## **I. Background**

In its Funding Commitment Decision Letters, USAC observed that the School District selected the vendor with the second highest point total and, because of that, was not entitled to E-rate support for its contract. Even if a school or library has a legitimate reason not to select the highest-scoring vendor and state and local procurement law allows this kind of decision to be made, the school or library must still contract with highest-scoring vendor, according to USAC. Once the points have been tallied, USAC explained, program rules prohibit applicants from exercising any independent judgment whatsoever with respect to whom they may select to do business.<sup>3</sup>

---

<sup>3</sup> See USAC’s Funding Commitment Decision Letters, which are included as Exhibit 1, respectively, in both of the School District’s appeals, *supra* at n.2.

*...after determining those criteria and scoring the bids, the applicant must abide by the outcome of that review process and cannot then change the outcome at will even if, as you stated, you believed that the decision to change the award was in the best interest of the district.*

In other words, according to USAC, good sense and state and local procurement rules are totally irrelevant when it comes to whether an applicant may contract with anyone but the highest-scoring vendor. This uncompromising result, USAC explained, is what the Commission's rules require:<sup>4</sup>

*SmartWave was not disqualified from the bid, and therefore, after receiving the most points in the evaluation, and in accordance with program rules, should have been awarded the contract.*

In its appeal to the WCB, the School District went to great lengths again to explain why<sup>5</sup> the School District needed to make the decision it did and why the WCB should allow it to do so, but the WCB had no interest in explanations. It agreed with USAC's rigid interpretation of the rules, upholding the decision on the grounds that the School District "failed to adhere to its own evaluation criteria in the vendor selection process."<sup>6</sup>

Further informing USAC's decision not to fund the School District's requests for funding was its observation that the School District had included in its RFP "a near exact copy of the Guide for Designing a Wi-Fi Network" from the Xirrus website. Xirrus, it is enormously important to note, was the manufacturer of the wireless access points that the second-place vendor was offering to sell and which the School District was already using. Xirrus, of course, was not the winning vendor or even a bidder, and besides posting the technical, WLAN information on its website, which the School District does not dispute it copied, had nothing whatsoever to do with the School District's bid.

---

<sup>4</sup> *Id.*

<sup>5</sup> See the extremely in-depth explanation that the School District provided to USAC during the Special Review Process. This explanation included, among other things, a comprehensive cost analysis of the highest and second-highest scoring proposals. The School District response can be found in the Exhibits to the March 2, 2012 appeal: <https://www.fcc.gov/ecfs/filing/6017021382/document/7021896825> (No. 762323) filed March 2, 2012) at pp. 43 – 61 of the PDF document.

<sup>6</sup> *Supra* at n.1.

Notwithstanding the following: (1) the allegedly anti-competitive material was nothing but technical, WLAN information; (2) copying neutral technical materials from a manufacturer's website into RFPs is not uncommon or even arguably anticompetitive; (3) since FY 2013, program rules have allowed applicants to denote a manufacturer preference by stating X brand "or the equivalent;" and, moreover, (4) **in FY 2010 and 2011, the funding years in issue, program rules permitted applicants to include brand preferences in RFPs without any further qualification,**<sup>7</sup> USAC still found it necessary to mischaracterize what the technical information actually was, what the School District actually did, and what the totality of it all actually meant:<sup>8</sup>

*Copying the RFP requirements from a vendor's website signals to other bidders that the district may have already reached a conclusion about the outcome of the competitive bidding process before it has run, and compromises the fair and open competitive bidding process required by FCC rules.*

On appeal, the WCB -- with no factual foundation -- went even further:<sup>9</sup>

*In addition, we deny the appeal for Application Number 762323 on the basis that Atlanta Public Schools (APS) provided an unfair advantage to the winning bidder by involving them in the competitive bidding process. As a result, APS compromised a fair and open competitive bidding process because all potential bidders did not have access to the same information.*

WCB's finding is puzzling and troubling to say the least. USAC never accused the School District of involving the winning bidder in the competitive bidding process. All USAC did was observe that the School District had copied technical, WLAN information from a manufacturer's website, which somehow, according to USAC, "signaled" a preference for the winning vendor. Once again, Xirrus was the manufacturer -- not the winning vendor or even a bidder.

---

<sup>7</sup> The funding requests in issue are for Funding Year 2010. *See Request for Review of a Decision of the Universal Service Administrator by Queen of Peace High School*, Order, CC Docket No. 02-6, DA 11-1991, (WCB 2011) at para.8 (*We therefore clarify that, for Form 470s or RFPs posted for Funding Year 2013 or thereafter, applicants must not include the manufacturer's name or brand on their FCC Form 470 or in their RFPs unless they also use the words "or equivalent" to describe the requested product or service.*). Emphasis added.

<sup>8</sup> *Supra* at n.3.

<sup>9</sup> *Supra* at n.1.

USAC never alleged any involvement on the part of the actual winning bidder. Since there was no allegation and no evidence of involvement on the part of the winning bidder in the competitive bidding process, we have no idea why the WCB would say that there was, let alone cite it as a reason for denying the School District its funding. Nor do we understand why the WCB would say that “all potential bidders did not have access to the same information” when there was no allegation to that effect and no basis for one.

## **II. Factors Warranting the Commission’s Consideration**

Pursuant to 47 C.F.R. § 1.115(b)(2) of the rules, the Commission should grant this application for review because the WCB’s action, taken pursuant to delegated authority, is: (1) in conflict with established Commission rules and policy (*the evidence shows that the competitive bidding process was open and fair and conducted in accordance with state and local procurement regulations*); (2) based in part on an erroneous finding as to an important or material question of fact (contrary to the WCB’s finding, the winning vendor had absolutely no involvement in the School District’s procurement process); and (3) involves a question of law or policy which has not previously been resolved by the Commission and/or involves the application of a precedent or policy which should be overturned or revised (*the Commission has never examined or attempted to define the legal and practical limit of its authority to oversee and regulate the competitive bidding processes of E-rate applicants or to what extent and in what circumstances it should defer to state and local procurement rules, regulations and procedures, which historically have governed schools’ and libraries’ procurement processes*).

## **III. Reasons for Reversal**

These are the basic facts along with the reasons why the WCB’s decision should be reversed. Seven vendors submitted WLAN networking proposals. Five of them did not include Xirrus equipment. The School District awarded its wireless networking contract to the second-highest-scoring vendor overall. This vendor offered the lowest price on Xirrus wireless networking equipment.

The School District had already invested a substantial amount of money in purchasing and installing this brand of equipment. It knew that a patchwork quilt of wireless equipment brands would be difficult to implement, costly to maintain, inefficient, and counterproductive. Thus, while open to alternatives, there is no question that the School District's preference was for one, cost effective, district-wide wireless solution for all of its schools and facilities. The School District has never denied this. There was absolutely no reason to, as its preference was reasonable and made perfect sense.<sup>10</sup>

The School District's Chief Information Officer believed strongly that this was the correct decision because the total cost of accepting the #1 point scorer's proposal, which did not include Xirrus equipment, would cost the School District considerably more money over time and be significantly more difficult and time consuming to implement. The School District's response to the Special Compliance Review explained all of this, detailing why, exactly, it was in the best interest of the School District to award its contract to the #2 bidder and noting, moreover, that it had the local authority to make this decision and to make it for this reason.<sup>11</sup>

**No Program Rule Or Policy Prohibited the School District From Selecting the Second-Highest-Scoring Vendor In These Circumstances.**

The reason why the School District rejected the highest-scoring vendor was of no interest to either USAC or the WCB. Neither USAC nor the WCB disputed or even questioned the legitimacy of the School District's reasoning or its assertion that state and local law allowed it to award its contract to the second-highest-scoring vendor in these particular circumstances. For both USAC and the WCB, the entire matter was simple and straightforward – the School District was not entitled to E-rate funding because program rules gave the School District no choice but to award its contract to the highest-scoring vendor, even when it had a legitimate reason (short of disqualification) not to do so. Apparently, E-rate rules afford applicants no contracting discretion, unless there is a

---

<sup>10</sup> It is well established that standardizing on network equipment saves organizations considerable sums of money over time and, not insignificantly, from substantial down time.

<sup>11</sup> *Supra.* at n.5.

reason to disqualify the top-scoring proposal. This at least is what WCB and USAC appear to believe. We strongly disagree.

For good reason, the Commission has never adopted such a hard and fast, unbending rule. Such a rule would unnecessarily reduce the autonomy of applicants to make procurement decisions that best suit their local needs. Moreover, the Commission's policy has never been to permit USAC's administrative interests in procedural and mathematical exactitude to trump the needs of schools and libraries for practical, common sense solutions to their local telecommunications and networking needs.

Here, the WCB simply went too far. To the best of our knowledge, there is no rule, policy, or even precedent that necessitated USAC and the WCB to decide as they did. As the School District's contracting decision was reasonable, fair, and entirely legitimate under the circumstances, neither USAC nor the WCB should have second-guessed it. If there is such a policy, then we urge the Commission to address and change it accordingly.

**The WCB's Decision Should Also Be Reversed Because It Is Based In Part On An Erroneous Finding As To A Material Question Of Fact.**

The WCB denied the School District's appeal for two reasons. The second reason was based on the erroneous finding that "Atlanta Public Schools (APS) provided an unfair advantage to the winning bidder by involving them in the competitive bidding process." This is completely false. There has never been a single allegation, nor any evidence whatsoever of, any involvement on the part of the winning bidder in the competitive bidding process.

The only allegation of so-called improper vendor involvement in the competitive bidding process was USAC's observation that the School District had copied into its RFP a network diagram and some technical language from the website of the manufacturer whose equipment it preferred. This is true. The manufacturer, however, is not a vendor. Nor is there anything anticompetitive about this kind of copying. Indeed, it is even more benign than stating in an RFP that the school or library has a preference for X brand or

the equivalent, which, according to the Commission, is perfectly acceptable.<sup>12</sup>

What's more, during the funding years in issue, FY 2010 and 2011, it was okay for applicants to include brand preferences in their RFPs; it was not until FY 2013 that the Commission began to require the qualifier, "or the equivalent."<sup>13</sup> It follows, therefore, that if it was not a competitive bidding violation in FY 2010 and 2011 to include in an RFP the brand of equipment that an applicant wished to purchase or preferred, it could not possibly have been a violation of program rules in FY 2010 and FY 2011 to copy technical information from an unidentified manufacturer's website into an RFP.

In its RFP, the School District expressed no brand preference. All it did was copy technical information from a manufacturer's website into it. This, it should be noted, did not stop vendors from including equipment from other manufacturers in their proposals. Indeed, five of the seven proposals that the applicant received did not include Xirrus equipment. In the *Queen of Peace Order*, it was precisely this – service providers besides the one named in the applicant's RFP submitting proposals -- that led the Commission to conclude that the applicant had not undermined the competitive bidding process by identifying in its RFP the service provider it preferred.

Unlike the *Queen of Peace* applicant, the School District did not state a preference for doing business with a particular company. However, similar to the *Queen of Peace* applicant's RFP, the School District's RFP did attract proposals from companies offering to provide equipment from a variety of manufacturers. It is positively inconceivable, therefore, that what the School District did -- copying technical information from a manufacturer's website into its RFP – could be found to have discouraged competition in violation of program rules.

---

<sup>12</sup> See *Queen of Peace Order*, supra at n.7.

<sup>13</sup> See *Queen of Peace Order*, supra at n.3 (However, a request for "XYZ manufacturer's high-speed router model 345J," without the words "or equivalent," will constitute a violation of the Commission's competitive bidding process for Funding Year 2013 or thereafter because the description could suggest to potential bidders that the specific products and services are predetermined).



## **Important Policy Issues Raised By The WCB's Decision**

- Has the Commission, in its efforts to promote competition for E-rate eligible services, gone well beyond what is necessary, reasonable, and appropriate?
- Is it the Commission's intent to become, in effect, a state and local contract review board?
- Is the Commission doing more harm than good by permitting and perhaps even encouraging USAC to interpret language in applicants' RFPs ("cardinal changes" for example) and to second-guess the procurement decisions of the tens of thousands of school and library applicants in the United States and its territories?

What happened here is simply another example of USAC, an organization with limited authority, resources, legal expertise, and procurement experience, attempting to micro-manage a school or library's competitive bidding process. This, we submit, needs to stop. The Commission is allowing USAC to become a federal procurement police force and turning itself into a federal procurement court of appeals. We cannot believe that this is the direction in which the Commission wishes to go.

The Commission could begin to right the ship by listing, with sufficient specificity and clarity, the types of conduct that it considers to be obvious and egregious anti-competitive behavior sufficient to nullify a funding request, and direct USAC to be on the lookout for only those types of behaviors. This alone will dramatically improve how the program operates and give applicants the guidance they desperately need, as well as more confidence in the process as a whole.

Procuring goods and services is an art, not a science. Sometimes, when all of the dust settles, it becomes clear, for example, that the #2 choice is the wiser, more cost effective one to make, and the Commission should allow applicant to make it. Procurement is a complex process. Every state and virtually every locality regulates it. Overseeing tens of thousands of procurements is an incredibly difficult and time-

consuming process. Yet, as we have already observed, this is the direction in which the Commission appears to be heading.

Of course, E-rate procurements should all be open and fair, but the Commission does not have the resources and expertise to investigate and decide every single event that might “look bad” or to examine the language in countless RFPs, looking for words and phrases that could possibly be construed as anticompetitive. The reality is that the Commission cannot look to USAC for help in this regard because it is even more ill equipped than the Commission to tackle such a complex and gargantuan task.

More important though is the question whether this is a task that is suited for a federal agency that regulates interstate and international communications, or is it a body of work better left to state and local government agencies to handle. This is an extraordinarily important question begging for the Commission’s immediate attention. Accordingly, we urge the Commission to re-examine its competitive bidding rules and policies in their entirety and to give the E-rate community, including USAC, the very clear guidance it requires and deserves.

#### **IV. Request for Waiver**

In the alternative, the School District requests that the Commission waive its rules in order to fund all of the requests in issue. A waiver in these circumstances is certainly warranted. The School District should not be penalized for deciding not to rubber stamp the mathematical outcome of an evaluation review process. Badly needed funding should not be denied because USAC and the WCB made erroneous findings of fact.

The *Queen of Peace Order* did not affect FRNs for the two funding years in issue, FY 2010 and 2011. It would be inequitable, therefore, to deny funding to the School District for copying technical information from a manufacturer’s website into an RFP for FY 2010 and 2011 services, since the School District could have expressed a direct

preference for that particular manufacturer's equipment in its RFP without violating program rules.

The School District's CIO concluded, and, after reviewing his recommendation, the School District's other senior officials involved in the procurement process all agreed, that it did not make good economic, operational, or administrative sense to accept the highest-scoring proposal. Neither state nor local rules prohibited that decision, and despite a great deal of political and partisan uproar at the time, what became perfectly clear at the end of the day was that the procurement process had been perfectly fair and open. In short, the School District selected, exactly as E-rate rules require, the most cost effective proposal it received.

**V. Conclusion**

For all of the reasons set forth and discussed above, the School District respectfully requests that the Commission reverse the WCB's decision, fund all of the FRNs in issue, and direct USAC to take whatever administrative actions may be necessary to effectuate this result. Alternatively, the School District respectfully requests that the Commission reach the same result by waiving its rules.

Respectfully submitted  
*on behalf Atlanta Public Schools*

*/s/ John D. Harrington*

---

John D. Harrington  
Chief Executive Officer  
Funds For Learning, LLC  
2575 Kelley Pointe Parkway – Suite 200  
Edmond, OK 73013  
405-341-4140  
jharrington@fundsforlearning.com

January 27, 2017